Before the
Federal Communications Commission
Washington, D.C. 20554

PR Docket No. 93-231

In the Matters of

Imposition of Forfeiture Against

CAPITOL RADIOTELEPHONE INC.
d/b/a Capitol Paging
1420 Kanawha Blvd. E
Charleston, West Virginia 25301

Former Licensee of Station WNSX-646 in
the Private Land Mobile Radio Services

and

Revocation of License of

CAPITOL RADIO TELEPHONE INC.
d/b/a Capitol Paging
1420 Kanawha Blvd. E
Charleston, West Virginia 25301

Licensee of Station WNDA-400 in the
Private Land Mobile Radio Services

and

Revocation of License of

CAPITOL RADIO TELEPHONE INC.
d/b/a Capitol Paging
1420 Kanawha Blvd. E
Charleston, West Virginia 25301

Licensee of Station WNWW-636 in the
Private Land Mobile Radio Services

and

Revocation of License of

CAPITOL RADIOTELEPHONE COMPANY, INC.
1420 Kanawha Boulevard East
Charleston, West Virginia 25301

Licensee of Station KWU-373 in the
Public Mobile Radio Service

and

Revocation of License of

CAPITOL RADIOTELEPHONE COMPANY, INC.
P.O. Box 8305
South Charleston, West Virginia 25303

Licensee of Station KUS-223 in the
Public Mobile Radio Service

and

Revocation of License of

CAPITOL RADIOTELEPHONE CO., INC.
1420 Kanawha Boulevard East
Charleston, West Virginia 25301

Licensee of Station KQD-614 in the
Public Mobile Radio Service

and

Revocation of License of

CAPITOL RADIOTELEPHONE COMPANY, INC.
1420 Kanawha Boulevard East
Charleston, West Virginia 25301

Licensee of Station KWU-204 in the
Public Mobile Radio Service

Appearances

Kenneth E. Hardman, on behalf of Capitol Paging, Capitol Radiotelephone Company, Inc., and Capitol Radiotelephone Co., Inc.; and, *David L. Furth,* and *John J. Borkowski,* on behalf of the Private Radio Bureau, now renamed as the Wireless Telecommunications Bureau.

DECISION

Adopted: February 9, 1996; Released: February 23, 1996

By the Review Board: MARINO (Chairman), and GREENE.

Board Chairman MARINO:

1. The Private Radio Bureau filed exceptions to an *Initial Decision,* 9 FCC Rcd 6370 (1994) (*I.D.*), by Administrative Law Judge Joseph Chachkin (ALJ), which held that there was no justification for the revocation of any of the licenses of Capitol Paging, Capitol Radiotelephone Company, Inc., and Capitol Radiotelephone Co., Inc. (Capitol) or for the imposition of a forfeiture. We affirm the ALJ's ultimate conclusion that there is insufficient record support for revocation of Capitol's licenses, *see* ¶ ¶ 25, 27 below. Based on our own findings, however, *see* ¶ ¶ 8-10, we conclude that significant rule violations have been established on the record that warrant the imposition of a forfeiture against Capitol, *see* ¶ ¶ 26-28. We also grant an exception by the Bureau that the ALJ erred in concluding that the Bureau

demonstrated bias towards Capitol, *see* ¶ ¶ 29-31; and, on our motion, strike from the *I.D.* adverse findings and conclusions relating to RAM Technologies, Inc. (RAM), a Commission licensee and party to this case whose licenses have not been designated for hearing and against whom no issues were specified, *see* ¶ 32.

FACTUAL BACKGROUND

2. Capitol is a radio common carrier licensee providing a radio paging service throughout much of the state of West Virginia and surrounding region. The instant controversy, however, pertains to Capitol's former operation of private carrier paging Station WNSX-646, at Huntington and Charleston, West Virginia, from September 12, 1990, to August 31, 1993. *See Hearing Designation Order, Order to Show Cause and Notice of Opportunity for Hearing,* 8 FCC Rcd 6300 (1993) (*HDO*). The two types of paging services are virtually identical from a technical standpoint, both utilizing the same type of equipment, but private carriers share paging frequencies whereas radio common carriers do not. Private paging stations also entail less regulatory restrictions, resulting in substantially lower subscription rates for users of the shared frequencies.

3. Capitol's private paging station shared the frequency 152.480 MHz with RAM's private paging Station WNJN-621, Charleston and Huntington, West Virginia. *HDO* at ¶ 2. Prior to the Commission's grant of Capitol's application, RAM filed a petition to deny against Capitol alleging that Capitol had sought the private paging station for the sole purpose of causing harmful interference to RAM's facility. *Id.* at ¶ 3. The Commission rejected RAM's allegations and RAM filed a petition for reconsideration. *Id.* The reconsideration petition was pending when the Commission granted Capitol's application. *Id.* Because of subsequent repeated interference complaints by RAM during Capitol's three-year stewardship of Station WNSX-646, as well as rule violations found by Commission inspectors during an unannounced monitoring and inspection of Capitol's facility on August 12 through August 15, 1991, the Commission granted RAM's petition for reconsideration; vacated the denial of RAM's Petition to Deny; rescinded Capitol's private paging license; returned the application to pending status; designated the application for hearing on interference, misrepresentation, lack of candor, and abuse of process issues; directed Capitol to show cause why its other licenses (including the common carrier licenses) should not be revoked; and sought to determine whether a forfeiture order should be issued against Capitol. *Id.* at ¶ ¶ 5, 21-28. The *HDO* made both the Bureau and RAM parties, and, except for an issue to determine whether Capitol's application should be granted, placed the burdens of proceeding and proof on the Bureau. *Id.* at ¶ ¶ 29-30. On December 6, 1993, Capitol filed a post-designation motion to dismiss its private paging application. The ALJ granted the motion. *Memorandum Opinion and Order,* FCC 93M-763, released December 22, 1993.

4. *Issues, Findings, and Conclusions.* The Commission designated four issues for hearing predicated on the RAM complaints:

> a. Whether, during the month of October 1990, from November 15, 1990 through November 18, 1990, on March 4, 1991, on March 19, 1991, and/or from July 17, 1991 through July 19, 1991, in light of the evidence adduced, [Capitol] willfully, maliciously and/or repeatedly caused private land mobile radio station WNSX-646 to transmit in a manner that caused harmful interference, in violation of Section 90.403(e) of the Commission's Rules, 47 C.F.R. § 90.403(e), and/or in violation of Section 333 of the Communications Act of 1934, as amended, 47 U.S.C. § 333.
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> c. Whether, on November 15, 1990 through November 18, 1990, on March 4, 1991, and/or from July 17, 1991 through July 19, 1991, in light of the evidence adduced, [Capitol] willfully, and/or repeatedly caused private land mobile radio station WNSX-646 to transmit communications for testing purposes in a manner such that the tests were not kept to a minimum and every measure was not taken to avoid harmful interference, in violation of Section 90.405(a)(3) of the Commission's Rules, 47 C.F.R. § 90.405(a)(3).
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> f. Whether from November 15, 1990 through November 18, 1990 [Capitol] caused private land mobile radio station WNSX-646 to willfully and/or repeatedly transmit on the frequency 152.480 MHz for purposes other than completing private carrier pages, in violation of Sections 90.173(b) and 90.403(c) of the Commission's Rules, 47 C.F.R. §§ 90.173(b) and 90.403(c). Further, whether the content of these transmissions included common carrier paging traffic in violation of Section 90.415(b) of the Commission's Rules, 47 C.F.R. § 90.415(b).
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> g. Whether, beginning on or about August 27, 1992 and continuing to the present, [Capitol] caused private land mobile radio station WNSX-646 to willfully and/or repeatedly transmit on the frequency 152.480 MHz for purposes other than completing private carrier pages, in violation of Sections 90.173(b) and 90.403(c) of the Commission's Rules, 47 C.F.R. §§ 90.173(b) and 90.403(c). Further, whether the content of these transmissions included common carrier paging traffic in violation of Section 90.415(b) of the Commission's Rules, 47 C.F.R. § 90.415(b).

HDO at ¶ 28.

5. Briefly, the ALJ resolved the foregoing issues in Capitol's favor, concluding that the Bureau had failed to establish that Capitol had caused malicious interference to RAM in violation of Section 333 of the Act or failed to take reasonable steps to avoid causing harmful interference. The following summarizes RAM's complaints and the ALJ's findings and conclusions:

(a) *October 1990.* Complaint of unspecified interference: No evidence adduced at hearing.

(b) *November 15 through 18, 1990 (Duplicate Pages).* Complaint that Capitol retransmitted pages from its common carrier operation onto the shared 152.480 MHz private paging frequency and therefore caused harmful interference to RAM's transmissions: The ALJ credited the testimony of J. Michael Raymond, Capitol's vice-president and chief operating officer, that Capitol had not begun operating its private paging system by November 1990 and therefore could not have caused malicious interference to RAM's station. *I.D.* at ¶ ¶ 18-19, 69-70. Capitol previously reported to the Commission that its private paging station was placed into operation in the latter part of March 1991. *Id.* at ¶ 19. The ALJ concluded that the undesirable phenomenon was probably an instance of "intermodulation" on the shared frequency (*i.e.*, a mixture of two different

frequencies that produces a signal on a third frequency, Tr. 1096), based on the testimony of Capitol's expert witness, Arthur K. Peters, who previously had observed comparable phenomena elsewhere. *I.D.* at ¶ 19 & n.9; Tr. 1094, 1097.

(c) *March 4, 1991 (Simultaneous Transmissions).* Complaint registered by A. Dale Capehart, currently RAM's corporate vice president, that Capitol's automatic station identification on March 4 transmitted on top of RAM's paging transmissions: The ALJ found that the transmission occurred when Capitol was in the process of installing and testing its private paging system and that Capitol had utilized a fixed receiver to monitor the shared frequency, which should have inhibited its transmitter from operating whenever a co-channel signal was detected. *I.D.* at ¶ ¶ 20-22, 72. He held that such a practice fully complied with the industry standard for preventing simultaneous transmissions. *Id.* at ¶ 72. The ALJ concluded that the complaint may not have been *bona fide* when RAM informed Capitol of the problem because the interference stopped before Capitol could get a technician out to investigate. *Id.* at ¶ 72. He also held there was no basis for concluding that Capitol had failed to monitor before transmitting on the shared frequency or to otherwise take reasonable steps to avoid causing interference to RAM. *Id.* at ¶ 73.

(d) *March 19, 1991 (Simultaneous Transmitter Start-up).* RAM's complaint that both Capitol's and RAM's transmitters began to transmit simultaneously on that date: The ALJ found that this complaint was evidenced only by a letter from Capehart to Capitol. *Id.* at ¶ 74. He held that the letter did not establish the truth of the matter and at most showed that Capitol and RAM had their "inhibitors" in place and functioning properly when both systems attempted to seize the channel for transmissions simultaneously. *Id.* at ¶ ¶ 74-75. The ALJ further held that the letter itself expressly refuted any finding that Capitol failed to monitor as required by the rules or that it willfully transmitted while RAM's transmissions were in progress. *Id.* ¶ 75.

(e) *July 17-19, 1991 (Imitative Tone Device).* RAM's complaint that Capitol had a device that was patched into its paging base station that imitated the sound of a tone page transmission: The ALJ found that Capitol denied it had or ever used such a device and that the Bureau never offered any evidence showing that Capitol did have such a device. *Id.* at ¶ ¶ 34-35. He held that even if RAM's witnesses were credited, the testimony was too general and conclusory to support any finding of violations by Capitol. *Id.* at ¶ 76.

(f) *August 27, 1992, to August 1993 (Dummy Transmissions).* RAM's complaint that Capitol duplicated some of its digital pages on its private paging facility that had previously been transmitted on the common carrier station: The documentary evidence for this complaint consists of two computer printouts, which RAM purportedly reproduced from monitoring Capitol's common carrier channel and the shared frequency on October 28, 1992. ¶ ¶ 50-51. RAM used a device called a Hark Verifier which is capable of tuning to a particular frequency, decoding the transmissions, and reproducing the decoded information on paper. *Id.* at ¶ 50. The printouts from two Hark Verifiers, one for each frequency, showed that there were some duplicates of messages that had been transmitted within 30 seconds to 4 or 5 minutes of each other on each frequency. *Id.* at ¶ 51. The ALJ credited Capitol's denial of the complaint and found that RAM never competently identified Capitol's transmitter as the source of the "dummy" pages on the private paging frequency. *Id.* at ¶ ¶ 105-106. He also concluded that the complaint was implausible because Capitol had just been hit with a $20,000 Notice of Apparent Liability for forfeiture, knew it was being closely watched by RAM, and had a healthy respect for the Commission because of having been a licensee for thirty years. *Id.* at ¶ 107. He held that because the dummy transmissions failed to walk on RAM's transmissions, they had no significant adverse impact on RAM's service. *Id.* at ¶ 108.

6. In conjunction with his findings and conclusions above, the ALJ further held that the Bureau failed to establish its theory that Capitol had become involved in the private paging business to cause interference to RAM's operation. *Id.* at ¶ ¶ 56-57. He found that the testimony of the RAM-affiliated witnesses was evasive and biased, and inherently unreliable. *Id.* at ¶ 66. The ALJ concluded that, even *assuming arguendo* Capitol would have engaged in misconduct, it was not plausible that Capitol would have engaged in the particular misconduct alleged here for the purpose of harming RAM because, for the most part, it resulted in only minor delays to RAM which were insignificant. *Id.* at ¶ 59. He reasoned that, even for the most serious allegation -- *i.e.,* August 1992 dummy pages, the "alleged interference' by Capitol was held until channel time became available." *Id.* The ALJ further found that Capitol had been a common carrier licensee for thirty years without blemish, and that Capitol and RAM did not effectively compete for the same group of customers, concluding they had "different niches" of the paging market due to their pricing strategies. *Id.* at ¶ ¶ 56-57. Capitol charged $30 per month for one common carrier unit; RAM charged $6 per month for a private paging unit. *Id.* at ¶ 56. In contrast, the ALJ found that RAM's motives for attempting to run Capitol off the shared channel were self-evident. *Id.* at ¶ 60. He found that RAM was the malefactor in this case and that the Bureau had accorded unequal treatment to RAM's and Capitol's complaints. *Id.* at ¶ ¶ 61-62.

7. Three other issues grew out of the Commission's monitoring and inspection of Capitol's facility on August 12 through August 15, 1991:

> b. Whether, on August 12, 13, 14, and 15, 1991, in light of the evidence adduced, [Capitol] willfully, maliciously and/or repeatedly caused private land mobile radio station WNSX-646 to transmit in a manner that caused harmful interference, in violation of Section 90.403(e) of the Commission's Rules, 47 C.F.R. § 90.403(e),and/or in violation of Section 333 of the Communications Act of 1934, as amended, 47 U.S.C. § 333.
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> d. Whether, on August 12, 13, 14, and/or 15, 1991, in light of the evidence adduced, [Capitol] willfully and/or repeatedly caused private land mobile radio station WNSX-646 to transmit communications for testing purposes in a manner such that the tests were not kept to a minimum and every measure was not taken to avoid harmful interference, in violation of Section 90.405(a)(3) of the Commission's Rules, 47 C.F.R. § 90.405(a)(3).
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> e. Whether, on August 12, 13, 14, and/or 15, 1991, in light of the evidence adduced, [Capitol] willfully and/or repeatedly caused private land mobile radio station WNSX-646 to identify its transmissions by

Morse code at a rate less than 20-25 words per minute, in violation of Section 90.425(b)(2) of the Commission's Rules, 47 C.F.R. § 90.425(b)(2).

HDO at ¶ 28.

8. The Board has made its own findings of fact on these issues because the *I.D.* glosses over evidence indicating that Capitol may have been derelict in its operations of the station. During the four days of monitoring of the Huntington and Charleston, West Virginia shared frequency, engineers James Walker and Donald Bogert of the Commission's Baltimore Field Office repeatedly heard an unusual series of identical sequential tones unaccompanied by any messages. Tr. 112-113; 253-254. They traced the transmissions, which occurred approximately once per minute and lasted approximately twenty seconds, to Capitol's station. *Id.* Walker testified they heard the tones "morning, afternoon, and evening ... perhaps as late as midnight." Tr. 134. When the engineers eventually went to perform an inspection of Capitol's station, William D. Stone, Capitol's president, told them initially that Capitol was range testing for a new control link frequency. Bureau Exh. 3, p. 3. He subsequently informed them that the testing was to determine coverage of the paging system. *Id.* After the Commission inspectors indicated that some automatic test function had to be programmed into the terminal to cause the tone sequence, Stone excused himself, Tr. 116, and Bob Wilson, Capitol's office manager, used a modem to connect them to the Huntington terminal, which contained the test set-up. *Id.;* Bureau Exh. 3, p. 3. Before the set-up could appear on the screen, however, the modem connection was severed by Capitol's Huntington office staff, and on being reconnected, Walker and Bogert found that the test function had been disabled and the test paging had ceased. Bureau Exh. 3, p. 3; Tr. 256, 275. Later, while attempting to examine the program of the paging terminal that would show how the tests had been set up, the inspectors discovered that the program had been deleted. Tr. 137; Bureau Exh. 3, p. 4. Walker recounted that he had been relayed by telephone to a secretary at the Huntington office who informed him that she had disabled the feature after becoming aware that no one was in the field to take advantage of the test paging. Bureau Exh. 3, p. 4. The record is silent as to any other information on this matter.

9. In addition to the alleged testing, the inspectors observed during their monitoring of the shared frequency that Capitol's Morse code identifier was operating at approximately 7 words per minute instead of the 20 to 25 words required by the rules, and that Capitol and RAM both "walked" on each other's transmissions; that is, began transmitting while the other was still on the air. *Id.* at pp. 1-2; Tr. 127-128. Because the tests ceased abruptly, the inspectors opined that the tests were a subterfuge to prevent RAM from utilizing the frequency to its maximum and that either Capitol's president Stone or someone else on Capitol's management staff directed the secretary to disable the tests. Bureau Exh. 3, p. 4. The inspectors reported to the Commission that it appeared Capitol was not serious about providing private paging services but was merely disrupting RAM's attempts to provide such a service and that RAM in retaliation had installed a timer that would permit Capitol no more than two minutes to complete its transmissions before RAM's transmissions would begin again. *Id.* at p. 5.

10. As a consequence of the inspection, the Bureau issued a Notice of Apparent Liability for Forfeiture against Capitol in the amount of $20,000, the maximum permissible under delegated authority, for intentionally causing harmful interference and failing to take adequate steps to minimize such interference, excessive testing, and failing to maintain the required rate of speed for Morse code identification. Bureau Exh. 12; *I.D.* at ¶ 48. At hearing, Walker testified that the "testing" was not typical in his experience, that he did not know why the data would be deleted if it were needed, and that he was of the view that the explanation of testing for paging coverage was invalid because Capitol was not operating at the fully authorized power and there were no indications that Capitol had any employees in the field. Tr. 137-139, 141-142; Bureau Exh. 3, p. 4. The Bureau further issued a letter of admonition to RAM warning that RAM's continued use of the timer would almost certainly result in a forfeiture or revocation proceeding for harmful interference. Capitol Exh. 25. It declined to take compliance action against RAM for the violations found by the inspectors because it believed that the interfered-with signals had been transmitted primarily for the purpose of intentionally obstructing RAM's communications. *Id.*

11. After observing the witnesses, the ALJ exonerated Capitol from the purported violations of Section 333 of the Act and Part 90 of the Commission's Rules. First, the ALJ concluded that the sequential tones heard by the inspectors were *bona fide* test transmissions, reciting that Walker did not challenge Capitol's evidence that the transmissions were good faith tests and only opined that the testing was excessive. *I.D.* at ¶ ¶ 82-83. The ALJ discounted Walker's opinion because Walker conceded that he did not claim to be an expert on paging, whereas Peters, Capitol's witness, claimed to be such an expert and was of the view that the testing was not excessive. *Id.* Second, with respect to those instances noted by the inspectors in which Capitol "walked" on RAM's transmissions, the ALJ found that Capitol's inhibitor was in place and functioning and that Peters was of the view that the cause "likely was transient factors affecting reception in particular instances." *Id.* at ¶ ¶ 78-79. The ALJ further found that the transmissions did not degrade or obstruct RAM's service and at most delayed RAM's transmissions momentarily. *Id.* at ¶ 85. He reasoned that Capitol's transmissions were generally held until channel time was available, and that the channel was unoccupied 25 percent of the time. *Id.* at ¶ ¶ 78, 89. Under these circumstances, the ALJ held that the evidence failed to establish that Capitol caused any malicious or willful interference or that it neglected to take reasonable precautions. *Id.* at ¶ 82. Third, as to the tardy rate of speed of Capitol's Morse code identification, the ALJ held that the Bureau failed to prove that Capitol "willfully" caused this act. *Id.* at 98. He noted that the defect was "due to an erroneous setting of the terminal card at the factory and a mislabeling of the settings on the card by the manufacturer." *Id.* at ¶ 99. The ALJ concluded that the matter was "not some plot to interfere with RAM by deliberately slowing down the identification transmissions." *Id.* at ¶ 100.

12. Finally, on the remaining designated issues, the ALJ held that there was no basis for finding any misrepresentation or lack of candor by Capitol. *Id.* at ¶ ¶ 110-113. He noted that the Bureau did not introduce any evidence of lack of candor in the case. *Id.* at ¶ 112. As to any misrepresentation, he found that the evidence, at most, reveals that there "may have been some minor inconsistency in the

precise identification of Capitol's [private paging] subscribers at the various times and places in responding to the Commission's different questions." *Id.* at ¶ 112. He held, however, that such responses were truthful and could not have misled the Commission in any respect. *Id.* The parties did not adduce any evidence on the abuse of process issue, which concerned whether Capitol filed its application in order to cause interference to RAM.

DISCUSSION

13. *Legal Standard.* The Bureau contends that the ALJ applied an erroneous legal standard for determining whether a forfeiture or revocation of Capitol's licenses was warranted; *i.e.,* that there must be an actual intent to interfere with or to obstruct RAM's transmissions. Bureau Br. at 2-3. It also contends that the ALJ erred in concluding that excessive testing does not constitute harmful interference where the testing does not involve "walking on another licensee's transmissions. *Id.* at 3-4. The Bureau is correct that it did not have to demonstrate that Capitol had "an intent to violate the law" in order to establish a violation of Part 90 of the Commission's Rules for purposes of revocation or forfeiture. *See HDO, supra,* 8 FCC Rcd at 6302 ¶ 11 ("For purposes of revocation under Section 312(a) (or a forfeiture under Section 503(b)) of the Act, ... establishing that a violation of the Act or the rules is willful does not require [the Commission] to establish that the licensee knew he was acting wrongfully; but only that the licensee knew that he was doing the acts in question."). The provisions of Part 90 of the Rules, as they pertain to the issues in this proceeding, essentially require licensees to cooperate with one another to avoid harmful interference between stations.

14. The Bureau is mistaken, however, insofar as its argument extends to the malicious interference prohibition of Section 333 of the Communications Act, 47 U.S.C. § 333, the crux of this proceeding. Section 333 forbids any person from "willfully or maliciously interfer[ing] with or caus[ing] interference to any radio communications of any station ... authorized by or under this Act." The legislative history of that section explicitly states that Section 333 fills a statutory void in the Communications Act against "willful or malicious interference." H.R. Rept. No., 316, 101st Cong. 1st Sess. 8 (1989). The provision prohibits " *intentional* jamming, *deliberate* transmissions on top of the transmissions of authorized operators already using specific frequencies in order *to obstruct* their communications ... ." *Id.* (Emphases added); *see also HDO* at n.13 ("this section [333] specifically prohibits harmful, intentional interference"). Part 90 of the Rules at issue here is not predicated on Section 333 of the Act and the provisions were adopted prior to Section 333's enactment. Additionally, the ALJ's blanket legal construction that "excessive" testing is not violative of the Act or the Commission's Rules where such "testing" occurs during unoccupied channel time, is too broad. Whether or not there would be a violation would depend on the particular facts of a case.

15. *Willful Interference.* The Bureau contends that the *I.D.* erroneously concluded that Capitol did not engage in willful [malicious] interference. It urges the Board to impose a forfeiture against Capitol and revoke its licenses. In support, the Bureau raises seven arguments, which we will address *seriatim.* We are not persuaded, however, that the arguments undermine the ALJ's ultimate conclusion. The Bureau initially disputes the ALJ's finding that Capitol's private paging station was not in operation in November 1990 and therefore could not have caused any interference to RAM. Bureau Br. at 4-5. In support, the Bureau refers to Capitol Exhibit 11, a statement, dated December 4, 1990, by J. Michael Raymond, Capitol's chief operating officer, categorically denying RAM's allegation that Capitol had retransmitted its common carrier pages on the shared frequency. Bureau Br. at 4-5. The Bureau argues that Raymond would have indicated in his statement that Capitol's private paging station was not in operation, if that had indeed been the case, and that the failure to state such a defense is evidence that the station was on the air in late 1990. We disagree. This matter was fully ventilated at hearing where the ALJ complained that counsel for RAM, who originally fashioned the argument, was merely quibbling over the specific language of Raymond's statement. Tr. 967. The ALJ aptly pointed out that Capitol's common carrier station was operating at the time, that the charge had also been in connection to the common carrier facility, and that a categorical denial of the charge was entirely appropriate. *Id.*

16. Second, the Bureau impugns the *I.D.*'s conclusion that Capitol's use of an "inhibitor" to monitor the channel before transmitting constituted a "reasonable precaution" against interference and thus precluded a finding of willful [malicious] interference. Bureau Br. at 8-9. Quoting language from the *HDO* that Capitol's use of the particular inhibitor "does not mitigate the charge of harmful interference," the Bureau argues that the ALJ "did not have the latitude to contradict" the *HDO. Id.* at 8. It further argues that where interference occurs notwithstanding monitoring, the licensee must take additional precautions, which Capitol failed to do here. *Id.* at 9.

17. Actually, the ALJ merely corrected a mistake in the *HDO* that had been based on an erroneous report by the Commission inspectors. During the inspection, the Commission engineers had examined Capitol's inhibitor and concluded that Capitol used a "modified scanning receiver with a totally functioning front panel squelch control" to detect when other stations were transmitting so as to inhibit the operation of its own transmitter. (Official Notice taken of Bureau Exh. 4, p. 2, rejected at hearing.) A squelch setting adjustment regulates how strong a signal must be before it will open the audio circuits of a receiver, and therefore the particular setting will effect whether the receiver detects a signal and inhibits the transmitter. Tr. 127. The inspectors' memorandum reported that "a fixed tuned receiver ... is a more industry accepted method for providing for transmitter inhibiting circuitry where channels are shared." Bureau Exh. 4, p. 2. The *HDO* recited information from the field inspection report reacting to Capitol's response that it had a proper functioning inhibitor. *HDO* at ¶ 12 & n.23.

18. At hearing, however, Capitol submitted the testimony of Billy C. McCallister who had personally installed the piece of equipment used by Capitol as the system's channel monitoring receiver and transmit inhibitor. Capitol Exh. 21. McCallister is a technician with the company contracted by Capitol to handle certain of its radio frequency technical matters. *Id.* McCallister explained that he installed a carrier-operated relay switch behind the squelch circuit that closed whenever a signal was present and prevented Capitol's paging terminal from operating the base station. *Id.* He stated that the relay closed independent of the particular squelch setting. *Id.* McCallister added that he programmed all 16 channels on the unit for the same

frequency so that the inhibitor would work like a fixed tuned receiver and only monitor the shared frequency for signals at all times. *Id.* On questioning by Capitol, the Commission engineers acknowledged at hearing that they had not examined the internal circuitry of Capitol's monitoring unit. Tr. 163. The ALJ's finding at note 24 of the *I.D.* rectified the inspectors' mistaken assumption. Although the Bureau is correct that licensees must take such measures that may be necessary to minimize the potential for causing interference, *see* 47 CFR § 90.403 (e), Capitol should not be faulted for failing to take additional precautions based on those few occasions the inspectors heard Capitol's transmissions walk on RAM's signals on August 12-15, 1991, because, as Capitol cogently points out, it was not informed at the time by either RAM or the Bureau that its transmissions were causing interference. Capitol Reply at 11-12.

19. Third, the Bureau argues that the ALJ had no "latitude to contravene" language from the *HDO* 's reciting that "Capitol and RAM are competitors" in the provision of paging services in Charleston and Huntington, West Virginia. Bureau Br. at 9-12. It charges that the ALJ thus erred in concluding that Capitol had no competitive motive to interfere with RAM. *Id.* The ALJ had opined that, because Capitol and RAM have "somewhat different niches of the paging market," "it would have been entirely pointless for Capitol to have engaged in such a scheme [driving RAM off the air] as alleged by [the Bureau]." *I.D.* at ¶ 57. The Bureau is correct that Capitol and RAM were competitors and that Capitol had a potential motive for disrupting RAM's operation; *i.e.,* to prevent Capitol's common carrier customers from abandoning it and flocking over to RAM due to RAM's lower rates; *i.e.,* $6 per unit versus Capitol's $30 (if one assumes only a slight difference between the quality of the services). We will grant the Bureau's exception in this regard.

20. The Bureau's fourth and fifth arguments relate to the ALJ's credibility findings and will be addressed together. The ALJ had discounted the testimony of the RAM-affiliated witnesses and credited Capitol's witnesses as "forthcoming and entirely believable." *Id.* at ¶ ¶ 66, 105. The Bureau claims, however, that Capitol's responses to the allegations of interference are inconsistent and inherently incredible, alluding to certain portions of the record. Bureau Br. at 12-13. It also challenges the accuracy of a statement by the ALJ (at note 8 of his *I.D.)* that "no evidence from a disinterested witness corroborating RAM's charges has been offered." Bureau Br. at 13-14. The Bureau asserts that the Commission inspectors corroborated the testimony of the RAM-affiliated witnesses, and claims that a reversal of the ALJ's credibility findings is warranted. *Id.*

21. We discern no basis from the Bureau's pleadings for overturning the ALJ's credibility findings concerning the Capitol witnesses. The ALJ is the only adjudicative official who observes the witnesses' testimony and his findings, therefore, "are by law entitled to great weight." *Ramon Rodriguez and Associates, Inc.,* 9 FCC Rcd 3275 (Rev. Bd. 1994), *quoting Lorain Journal Co. v. FCC,* 351 F. 2d 824 (D.C. Cir. 1965), *rev. denied,* 10 FCC Rcd 971. The "Board may not upset those findings unless such reversal is supported by substantial evidence." *Ramon Rodriguez, supra.* Our examination of the record transcript citations adverted to by the Bureau fails to reveal any internal contradictions in Capitol's explanations or to support the Bureau's argument that the inspectors corroborated the testimony of the RAM-affiliated witnesses. The latter witnesses did not testify about the August 1991 period when the inspectors conducted their monitoring, and the inspectors testified only about that period.

22. As to the accuracy of the record, the Bureau's Brief itself contains two inaccuracies: (1) that Walker testified that "intermodulation could not have been the cause" for claimed interference in November 1990 (Br. at 13); and (2) that "retransmission [in 1992] of Capitol's common carrier traffic on [the shared] channel could *only* have been caused by Capitol." *Id.* (Italics in original). Walker did not testify that intermodulation could not have caused the 1990 interference. Rather, he merely disagreed with a statement by Arthur Peters, Capitol's expert witness, at Tr. 1204-1205, that intermodulation could ever produce an almost perfectly pure non-degraded sound. Tr. 1458, 1483-1484. Walker was of the opinion that intermodulation would be accompanied by some distortion perceptible to the trained ear (he excluded himself as being able to detect the distortion however). Tr. 1483. He also acknowledged that a subsequent claim by RAM of interference from a broadcast station in March 1991 suggested a problem of intermodulation. Tr. 1484. On the second matter, *i.e.,* the Bureau's claim that the 1992 duplicate retransmissions could only have been caused by Capitol, we note that the Bureau's assertion is based on a RAM employee who testified that he did not think RAM could "chain," or duplicate its private pages to a frequency that Capitol was using. Tr. 452-455. However, Capitol's expert witness subsequently expounded on how the duplicate transmissions could have been accomplished by RAM or any outside third party. Tr. 1116-1118. We will not reverse the ALJ's credibility findings concerning the Capitol witnesses.

23. The Bureau's sixth argument is that the ALJ erred in denying its request that Capitol produce William D. Stone, Capitol's president, for cross-examination. Bureau Br. at 14-15. The Bureau argues that Stone was a material witness on the issues and that it properly notified Capitol that it wanted Stone produced for cross-examination. It claims that, because Stone was not produced, the *I.D.* should have inferred that Stone's testimony would have been unfavorable to Capitol, citing *Lee Optical and Associated Companies Retirement and Pension Trust Fund,* 2 FCC Rcd 5480, 5486 (Rev. Bd. 1987) for support. Br. at 15. We will deny the exception. Capitol never listed Stone as a witness and thus a request for cross-examination did not properly lie. Reply Br. at 16. Moreover, as the ALJ explained in a bench ruling, the Bureau had an obligation to include Stone in its direct case if it felt Stone had material evidence since it had the burden of proof on the issues. Tr. 42-46. It did not do so here. The Bureau's reliance on *Lee Optical* is misplaced. There, the party with the burden of proof on the issue was remiss and failed to produce the witness. The Board held that that party must bear the consequences of failing to introduce evidence which might have been helpful to it. That is not the case here.

24. Seventh, the Bureau claims that the so-called "test" transmissions monitored by the Commission inspectors provide clear evidence that Capitol caused willful [malicious] interference to RAM. Bureau Br. at 5-8. It also charges in this regard that the ALJ's decision to disregard Walker's characterization of the transmissions as "excessive," predicated on the purported testimony of Capitol's expert witness Arthur Peters that the transmissions were valid tests, is unsupported by the record. *Id.* at 7. At the outset, we conclude that Peter's testimony does not estab-

lish that Capitol's tone transmissions were "*bona fide* test transmissions." A close reading of that testimony reflects that Peters had no specific knowledge of what Capitol was actually doing at the time the transmissions were monitored by Walker and Bogert. Tr. 1175-1176. He was simply responding to general questions concerning testing, having earlier voiced his opinion that brief test transmissions interspersed among normal channel communications are not *per se* excessive, even if they persist over a prolonged period of time. Tr. 1129-1130. Peters opined that such tests could indeed be legitimate, and apparently assumed that was the case concerning Capitol's transmissions. Tr. 1130, 1175. We hold that Walker's testimony that Capitol's "testing" was "excessive" should have been credited, since he and Bogert were in a superior position to accurately assess the facts. Both Commission engineers listened to the transmissions for nearly a week and questioned the people involved. As the Bureau notes, Walker is a "highly qualified field engineer with 18 years of Commission experience in enforcing radio-related rules and regulations, monitoring and investigating interference complaints, and helping to identify and resolve interference problems." Bureau Br. at 7. Additionally, Capitol's counsel conceded that Capitol was "not even contesting the excessive testing charge," Tr. 1049, and the secretary who purportedly disabled the transmissions purportedly did so because no Capitol employee was in the field to listen to the tests. *See* ¶ 11, *supra.*

25. Whether or not the tone transmissions provide clear evidence of malicious interference for purposes of Section 333 of the Communications Act is a close question, but one that must be resolved in favor of Capitol since the burden of proof of establishing Capitol's intent to deliberately cause malicious interference rested on the Bureau. *See* 47 U.S.C. § 312 (d). As to the areas of our concern, the record is void as to an adequate explanation of Capitol's purported test transmissions or the circumstances surrounding the abrupt cessation of those functions. And, there are the "dummy" common carrier transmissions in October 1992, which were never definitively explained. However, we cannot summarily dismiss Capitol's evidence that it had continuous problems with its link frequencies that disrupted the reliability of its private paging services. Moreover, the Bureau never produced any individuals personally involved in the shutdown of the test transmissions that may have shed light on what occurred. In any event, it appears from the Commission's week-long monitoring of the shared frequency that Capitol did hold its transmissions back until channel time was available, which undercuts allegations that Capitol deliberatively intended to disrupt RAM's private paging operation. Additionally, the ALJ, who had ample opportunity to observe all of the witnesses, found the Capitol witnesses forthcoming and credible. The Board will not attribute a sinister motive to Capitol based solely on the existence of the transmissions. As the ALJ found, they caused no measurable disruption of RAM's services, and the most that could be said about them was that they delayed RAM's pages momentarily. We are mindful, however, that Capitol's dismissal of its application prior to the parties' direct cases diminished the parties' incentives for presenting their strongest cases.

26. Although we reject the Bureau's arguments that Capitol caused malicious interference to RAM for purposes of Section 333 of the Communications Act, the record is clear that Capitol's transmissions on August 12, 13, 14, and 15, 1991, were violative of the Commission's Rules, specifically Section 90.403(e) requiring licensees to take reasonable precautions to avoid causing harmful interference including taking such measures as may be necessary to minimize the potential for causing interference; and Section 90.405(a)(3), requiring licensees to keep tests to a minimum and to employ every measure to avoid harmful interference. We also find that Capitol's repeated identification of its station by Morse code at a rate less than 20-25 words per minute during the four-day monitoring was violative of Section 90.425(b)(2). That section requires licensees to maintain a "Morse code transmission rate ... between 20 and 25 words per minute" when using automatically activated equipment to transmit their station identifications. The *I.D.* found that the Capitol's Morse code identification rate was less than that required by the rules. *I.D.* at ¶ 99. That is all that is necessary to establish a violation of that Rule. The ALJ's conclusions on the remaining designated issues are affirmed.

27. Absent malicious interference, the foregoing rule violations are not sufficient to warrant revocation of Capitol's common carrier licenses, which it has held for thirty years without previous blemish. Except for the few instances where Capitol's private paging transmissions walked on RAM's signals, which may have been attributable to the transient factors noted by the ALJ, and the brief delays brought about by its "testing," there is no evidence that Capitol's transmissions caused any serious disruption to RAM's operation. And, as for the slow Morse code transmission rate for the station identification, the record fails to support the conclusion that Capitol deliberately slowed down the rate in order to interfere with RAM's station. Nonetheless, Capitol was grossly neglectful in its "test" transmissions. The Commission inspectors repeatedly heard the transmissions over a four-day period lasting as late as midnight even though it appears there were no Capitol employees in the field to take advantage of the tests, and the questionable transmissions did not cease until Walker and Bogert appeared unannounced at Capitol's facility. Capitol was also slack in its Morse code station identification. It knew that the identifier was being transmitted and could easily have discovered the incorrect rate of speed had it taken reasonable measures to ensure that its facility fully complied with Commission's Rules.

28. The original forfeiture of $20,000 assessed against Capitol was derived from the Commission's *Policy Statement, Standards for Assessing Forfeitures,* 6 FCC Rcd 4695 (1991), *recon. denied,* 7 FCC Rcd 5339 (1992), *revised,* 8 FCC Rcd 6215 (1993), which was subsequently set aside in *United States Telephone Ass'n v. FCC,* 28 F.3d 1232 (D.C. Cir. 1994). That amount was also largely based on violations of malicious interference, which the present record does not justify. As a result of the *United States Telephone* decision, we have calculated Capitol's forfeiture pursuant to the statutory factors set forth in Section 503(b)(2)(D) of the Act; *i.e.,* taking into account "the nature, circumstances, extent, and gravity of the violation, and, with respect to the violator, the degree of culpability, any history of prior offenses, ability to pay, and such other matters as justice may require." In *Texidor Security Equipment, Inc.,* 4 FCC Rcd 8694 (1989), the Commission upheld a forfeiture of $1,000 for a violation of Section 90.403(e) of the Rules. There *inter alia,* a licensee's continuous utilization of a shared channel prevented another licensee from using the frequency. Additionally, a $1,000 forfeiture has been issued against a licensee for violation of Section 90.425 of the Rules where the licensee failed to identify its station on

one day. *See, e.g., Instant Page Inc.*, 9 FCC Rcd 2027 (1994). However, the Private Radio Bureau previously has interpreted a violation of Rule 90.425(b)(2) as a "miscellaneous violation," *see* Letter from Richard J. Shiben, Chief, Land Mobile and Microwave Division, Private Radio Bureau, to Capitol Radiotelephone Inc. (July 30, 1992), which, even under the new proposed guidelines does not exceed $250 for each day of violations. *See Notice of Proposed Rulemaking on Forfeiture Guidelines*, 10 FCC Rcd 2945 (1995). Similarly, Section 90.405(a)(3) falls within that same category. Based on the statutory factors and the precedent cited, we find that a forfeiture of $6000 for the four days of violations is appropriate.

29. *Bias.* The Bureau charges that the *I.D.* erroneously concluded that it was biased against Capitol and partial towards RAM. Bureau Br. at 16-23. The ALJ had found at ¶ 62 of the *I.D.* that the field inspectors received a "marching order" from the Bureau to revoke Capitol's licenses and to impose a forfeiture if they could establish malicious interference while contemporaneously ignoring Capitol's complaints about RAM's corroborated by a declaration from another paging competitor. Based on our *de novo* review of the record, *see Maria M. Ochoa*, 10 FCC Rcd 4323, 4324 ¶ 9 (Rev. Bd. 1995) (subsequent history omitted), we grant the Bureau's exception. Walker, whose inspection report largely precipitated the instant proceeding, testified on cross-examination that the inspectors' so-called marching order, *i.e.*, the Bureau's request for the field inspection, did not improperly influence their investigation of the parties. Tr. 1478-1479. He stated that he did not initially view Capitol "as the bad guy," but, having previously received complaints from both parties, viewed both RAM and Capitol "as the bad guys." Tr. 1479-80. It was only after monitoring the shared frequency and conducting an inspection of the facilities of RAM and Capitol that he ultimately concluded that "Capitol [was] not serious about providing a private carrier paging service but [was] merely disrupting RAM's attempts to provide such a service by occupying as much airtime as they can justify (to themselves)." Bureau Exh. 3, p. 5. Bogert, his colleague, reached a similar opinion after observing the transmissions of both parties for nearly a week. Tr. 259. He stated that RAM's pages were sent to legitimate customers whereas those of Capitol were not. *Id.* Bogert also testified that RAM was very candid during the inspection of its station, explaining it had set its equipment so that if it was unable to get on the air for two minutes and had pages backed up, its transmitter would come on the air and deliver the pages to customers. *Id.* He contrasted RAM's attitude with that of Capitol's, reciting that Capitol never explained why its transmitters walked on top of RAM's pages. *Id.*

30. Additionally, the Bureau's past behavior concerning the two parties is not indicative of uneven treatment towards Capitol. The Bureau ruled in *favor* of Capitol in originally granting Capitol's license and overruling RAM's objections, *HDO* at ¶ 3; *I.D.* at ¶ 18. It accorded admonitions to *both* parties in a meeting on April 2, 1991, where it "bluntly told RAM and Capitol to cut out their fighting and obey the rules, or all of their licenses would be revoked by the FCC," *I.D.* at ¶ 26. It continued to investigate Capitol's complaints until the April 2 meeting, after which time Capitol itself no longer apprised the Bureau concerning RAM, *id.* at ¶ 31. And, it initiated the investigation and inspection of *both* private paging licensees only after receiving complaints of a very serious nature that Capitol was using a device to send imitation tone page transmissions.

31. Finally, the Bureau is correct that the declaration to which the ALJ adverted to demonstrate uneven treatment, was not admitted into evidence for the truth of any matter asserted therein, and is not evidence of bias by the Bureau. *See* ALJ ruling at Tr. 46-48, 805-806. That declaration, by Calvin Basham, president of Communications Service, Inc. (CSI), accused RAM of repeatedly causing harmful interference to CSI. The Bureau did not challenge the declaration because of the ALJ's limited ruling. Tr. 48. The Bureau claims that it was prepared to establish that Basham had retracted his accusations. Bureau Br. at 22-23.

32. We will strike from the *I.D.* on our own motion the adverse findings and conclusions against RAM that it has a history of causing harmful interference to past competitors and that the complaints concerning Capitol underlying the instant proceeding are a result of a predetermined campaign by RAM to drive Capitol from the shared channel. *See generally I.D.* at ¶ ¶ 13 n.7, 61, 65. Those findings go far beyond the specified issues in this proceeding. RAM's licenses were not designated for hearing nor were any issues specified against RAM. Moreover, except for the disputed declaration from Basham and conjecture by Capitol's witness Arthur Peters at Tr. 1254, 1272-1273 that RAM itself could have been responsible for the "dummy" transmissions monitored by RAM's Hark Verifiers, the record is devoid of any indicia to support the ALJ's findings and conclusions.

33. *Miscellaneous.* One additional matter warrants a brief comment. The Bureau excepted to the ALJ's denial of a Joint Motion for Approval of Consent Agreement filed by the parties prior to the hearing in this case. *See Memorandum Opinion and Order*, FCC 93M-722, released November 22, 1993. In rejecting the Agreement, the ALJ held that it contravened Section 1.93 of the Commission's Rules, 47 CFR § 1.93, and Commission precedent, citing *Talton Broadcasting Co.*, 66 FCC 2d 974 (1977) and *A.S.D. Answer Service, Inc.*, 56 RR 2d 1518, 1520 (1984). We do not reach the exception because it is not decisional. We are mindful that there is confusion about whether a case like this could be settled, thereby conserving the Commission's limited resources. The Commission may wish to clarify the limits of permissible consent agreements insofar as they pertain to enforcement cases.

34. ACCORDINGLY, IT IS ORDERED, That pursuant to Section 503(b) of the Communications Act of 1934, as amended, Capitol Radiotelephone Inc., d/b/a Capitol Paging SHALL FORFEIT to the United States the sum of six thousand dollars ($6,000) for the willful and repeated violations of Sections 90.403(e), 90.405(a)(3), and 90.425(b)(2) of the Commission's Rules. Payment of the forfeiture may be made by mailing a check or similar instrument to the Commission, payable to the order of the Federal Communications Commission, within forty (40) days from the date of this Order, to: Federal Communications Commission, P.O. Box 73482, Chicago, Illinois 60673-7482.

35. IT IS FURTHER ORDERED, That copies of this Decision BE SENT to all parties, Return Receipt Requested.

FEDERAL COMMUNICATIONS COMMISSION

Joseph A. Marino
Chairman, Review Board